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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. DANIEL BAGLEY ROGERS, Defendant/Appellant.	Case No. 20030953-CA

BRIEF OF APPELLEE

AN APPEAL FROM A CONVICTION FOR THEFT BY RECEIVING STOLEN PROPERTY, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-408 (1999), IN THE THIRD JUDICIAL DISTRICT COURT OF UTAH, SALT LAKE COUNTY, THE HONORABLE PAT B. BRIAN PRESIDING

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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UTAH APPELLATE COURTS
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BRIEF OF APPELLEE

* * *

STATEMENT OF JURISDICTION

Defendant appeals from a conviction for theft by receiving stolen property, a second degree felony, in violation of Utah Code Ann. § 76-6-408 (1999). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (2002).

STATEMENT OF ISSUES

1. Was the State precluded from reopening its case after resting or from obtaining a continuance of the preliminary hearing under *State v. Brickey*, 714 P.2d 644 (Utah 1986), and its progeny or under Utah court rules?

Standard of Review. "Interpretation of case law presents a question of law which is reviewed for correctness." *State v. Atencio*, 2004 UT App 93, ¶ 7, 89 P.3d 191. The interpretation of a rule of procedure is likewise a question of law reviewed for correctness. *Ostler v. Buhler*, 1999 UT 99, ¶ 5, 989 P.2d 1073.

2. Was the evidence of defendant's constructive possession of the stolen memorabilia sufficient for bindover?

Standard of Review. The determination of whether to bind a criminal defendant over for trial is a question of law reviewed for correctness, without deference to the magistrate. *State v. Clark*, 2001 UT 9, ¶ 8, 20 P.3d 300.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah R. Crim. P. 7(i)

> (i)(1) Unless otherwise provided, a preliminary examination shall be held under the rules and laws applicable to criminal cases tried before a court. The state has the burden of proof and shall proceed first with its case. At the conclusion of the state's case, the defendant may testify under oath, call witnesses, and present evidence. The defendant may also cross-examine adverse witnesses.
>
> (2) If from the evidence a magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate shall order, in writing, that the defendant be bound over to answer in the district court. The findings of probable cause may be based on hearsay in whole or in part. Objections to evidence on the ground that it was acquired by unlawful means are not properly raised at the preliminary examination.
>
> (3) If the magistrate does not find probable cause to believe that the crime charged has been committed or that the defendant committed it, the magistrate shall dismiss the information and discharge the defendant. The magistrate may enter findings of fact, conclusions of law, and an order of dismissal. The dismissal and discharge do not preclude the state from instituting a subsequent prosecution for the same offense.

Utah R. Evid. 1102

(a) Statement of the Rule. Reliable hearsay is admissible at criminal preliminary examinations.

(b) Definition of Reliable Hearsay. For purposes of criminal preliminary examinations only, reliable hearsay includes:

(1) hearsay evidence admissible at trial under the Utah Rules of Evidence;

(2) hearsay evidence admissible at trial under Rule 804 of the Utah Rules of Evidence, regardless of the availability of the declarant at the preliminary examination;

(3) evidence establishing the foundation for or the authenticity of any exhibit;

(4) scientific, laboratory, or forensic reports and records;

(5) medical and autopsy reports and records;

(6) a statement of a non-testifying peace officer to a testifying peace officer;

(7) a statement made by a child victim of physical abuse or a sexual offense which is promptly reported by the child victim and recorded in accordance with Rule 15.5 of the Utah Rules of Criminal Procedure;

(8) a statement of a declarant that is written, recorded, or transcribed verbatim which is:

(A) under oath or affirmation; or

(B) pursuant to a notification to the declarant that a false statement made therein is punishable.

(9) other hearsay evidence with similar indicia of reliability, regardless of admissibility at trial under Rules 803 and 804 of the Utah Rules of Evidence.

(c) Continuance for Production of Additional Evidence. If hearsay evidence is proffered or admitted in the preliminary examination, a continuance of the hearing may be granted for the purpose of furnishing additional evidence if:

(1) The magistrate finds that the hearsay evidence proffered or admitted is not sufficient and additional evidence is necessary for a bindover; or

(2) The defense establishes that it would be so substantially and unfairly disadvantaged by the use of the hearsay evidence as to outweigh the interests of the declarant and the efficient administration of justice.

STATEMENT OF THE CASE

SUMMARY OF PROCEEDINGS

Defendant was charged with theft by receiving stolen property, a second degree felony, and theft by deception, a class B misdemeanor. R. 1-3. On December 17, 2003, a magistrate held a preliminary hearing. R. 222. The State called three witnesses and rested. *See* R. 222: 1-44. When defendant moved to dismiss for insufficient evidence, the prosecutor moved to reopen the case. R. 222: 45-47. The magistrate granted the State's motion and the State recalled the investigating officer. R. 222: 47-49. After the State finished questioning the officer, the parties argued the sufficiency of the evidence. R. 222: 49-47. The magistrate concluded that the evidence was sufficient to establish possession of all the recovered goods but the earrings, but that it did not adequately establish their value. R. 222: 57-59. The magistrate continued the hearing to permit the State to put on specific evidence of the value of the stolen goods that were recovered. R. 222: 58-61.

On January 7, 2003, the magistrate resumed the preliminary hearing. *See* R. 223. The State recalled the victim, who testified about the specific value of the recovered goods. R. 222: 69-117. After the State rested and the parties argued the evidence, the magistrate bound defendant over for trial on theft by receiving stolen property, but dismissed theft by deception. R. 223: 126. Defendant filed a motion to quash the bindover, which the trial court denied. R. 48-54, 175-81 (Addendum A). Defendant pled guilty to theft by receiving stolen property, amended to a third degree felony, reserving his right to appeal the trial

court's order denying his motion to quash. R. 217-18, 226. Defendant was sentenced to a suspended prison term of zero-to-five years and ordered to pay restitution. R. 182

SUMMARY OF FACTS

Preliminary Hearing (December 17, 2002)

The following evidence was introduced at the preliminary hearing on December 17, 2002.

On July 23, 2002, Robert Hildebrand returned home from work and discovered that his home had been burglarized. R. 222: 6-7. Taken from the home were hundreds of baseball cards and twelve autographed baseballs—estimated by Hildebrand to be worth more than $10,000. R. 222: 7-10, 20-26, 30. Also taken from Hildebrand's home was a new DVD player, a Minolta camera, a stereo, a set of black pearl earrings, and Olympic pins. R. 222: 7-11, 17-20. Hildebrand immediately reported the burglary to police. R. 222: 11.

The following day, Hildebrand notified local baseball card shops of the theft. R. 222: 11-12, 27, 30. About an hour after speaking with Hildebrand, Elvin Allen, the owner of a local card shop, was approached by two men offering to sell him "a bunch" of baseball cards that matched the description of those stolen from Hildebrand. R. 222: 28-29. Allen agreed to buy a few of the cards, issued a check for the purchase, and because the banks were closed for the holiday, referred the men to a local check-cashing store. R. 222: 28. After the men left, Allen notified Hildebrand and stopped payment on the check. R. 222: 13, 28-29. Hildebrand immediately notified police. R. 222: 13.

After receiving Hildebrand's report, police converged on the check-cashing store where they found defendant and his friend Joshua Boone attempting to cash a check, payable

to defendant, from a baseball card shop. *See* R. 222: 13, 33-35, 37, 39, 42. The two men were detained by police and questioned by Detective Clinton Johnson. R. 222: 35. After waiving his *Miranda* rights, defendant told Detective Johnson that while cleaning out abandoned storage units at work, he "found some baseball cards and other items" near a dumpster and decided to sell them because he knew they were worth some money. R. 222: 35, 37-39. Boone told Detective Johnson that defendant had asked him for a ride to the card shop so defendant could sell some baseball cards. R. 222: 43. On inspecting Boone's car, Detective Johnson saw an autographed baseball on the front passenger seat and a single baseball card on the passenger side floorboard. R. 222: 36.[1] When Hildebrand arrived on the scene, he confirmed that the autographed baseball was the most valuable of those taken from his home, worth "well over" $500. R. 222: 8, 13-14, 20.

In a search of Boone's car incident to arrest, police seized not only the baseball card and baseball from the passenger compartment, but additional baseball cards found in the trunk of the car. R. 222: 36, 40-41. Hildebrand verified that all of the baseball memorabilia belonged to him. R. 222: 36. In a subsequent search of Boone's residence, police found more of Hildebrand's baseball memorabilia, as well as Hildebrand's DVD player and Olympic pins. R. 222: 41.

After the State rested, counsel for defendant moved to dismiss both charges for insufficient evidence. R. 222: 45-47. Counsel urged that at best, the evidence was sufficient

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[1] The car was driven by Boone, but belonged to his girlfriend. R. 222: 39, 43.

for bindover on the theft by receiving charge at a reduced degree, arguing that the evidence did not establish the necessary value for a second-degree felony. R. 222: 45-46. The magistrate denied defendant's motion and granted the State's request to reopen its case to recall Detective Johnson. R. 222: 47. He provided the following additional information.

Detective Johnson recovered Hildebrand's earring set from a local pawn shop. R. 222: 48-49. The pawn receipt indicated that defendant pawned the earrings. R. 222: 49.

After finishing with Detective Johnson, the parties argued the sufficiency of the evidence for bindover. R. 222: 50-54. The magistrate concluded that the evidence was sufficient to bind defendant over on the theft by receiving charge, but was not satisfied with the evidence regarding the value of the recovered property. R. 222: 54-58. Against the objections of defense counsel, the magistrate continued the preliminary hearing to January 7, 2003 to permit the State to put on additional evidence of value. R. 222: 56-64.

Preliminary Hearing Continued (January 7, 2003)

At the preliminary hearing on January 7, 2003, Robert Hildebrand testified to the value of the baseball memorabilia as follows.

The baseball cards found in Boone's car were worth more than $1,200. *See* R. 223: 72-75, 80, 88. The autographed baseball found on the front passenger seat of Boone's car was worth $600. R. 223: 88-89. Nine more autographed baseballs, worth $700, were found in Boone's car. R. 223: 81-86. The baseball cards found in Boone's apartment were worth approximately $10,000. *See* R. 223: 92-113.

SUMMARY OF ARGUMENT

I. Defendant contends that under *State v. Brickey*, 714 P.2d 644 (Utah 1986), and its progeny, the prosecution was barred from reopening its case at the preliminary hearing and from obtaining a continuance to introduce additional evidence. The *Brickey* rule, however, applies only to the refiling of charges earlier dismissed at a preliminary hearing for insufficient evidence. It does not apply to reopenings or continuances. Nor should the *Brickey* rule be extended to reopenings and continuances. The risks of prosecutorial overreaching in refiling are not present in reopenings and continuances. Moreover, the rules of evidence and criminal procedure do not bar a reopening or continuance. Even assuming arguendo *Brickey* does apply, any failure of the prosecution to introduce evidence sufficient for bindover was at worst an innocent miscalculation of the evidence. As such, the magistrate properly reopened the prosecution's case and continued the hearing.

II. Defendant argues that the evidence was insufficient to establish defendant's constructive possession of the stolen baseball memorabilia in his friend's car and apartment. While the evidence *might* be insufficient to meet the reasonable doubt burden required at trial, it was more than sufficient to meet the relatively low evidentiary standard required at a preliminary hearing. Defendant admitted to possessing cards that had been stolen from Hildebrand, he tried to sell the cards, his friend indicated that defendant asked for a ride so defendant could sell the cards, and defendant confirmed that he rode with defendant to sell the cards. In light of this evidence, it is reasonable to infer that defendant took the cards to his friend's apartment and from there went to the card shop with some of the cards.

ARGUMENT

In his motion to quash the bindover, defendant argued that the magistrate improperly reopened the hearing after the State rested. R. 48-54. In denying his motion, the trial court reversed its ruling at the December 17 preliminary hearing and concluded that the evidence was sufficient for bindover *before* the State reopened its case. R. 179-80. The court also ruled that in any event, any alleged error in granting the motion to reopen was harmless. R. 190 fn.2.

I. THE MAGISTRATE IS NOT PRECLUDED FROM REOPENING A PRELIMINARY HEARING FOR ADDITIONAL EVIDENCE AFTER THE STATE HAS RESTED, OR FROM CONTINUING THE PRELIMINARY HEARING TO TAKE ADDITIONAL EVIDENCE

On appeal, defendant argues that the trial court erred in reopening the preliminary hearing after the State had rested and continuing the hearing to permit the State to present more specific evidence on the value of the stolen property that was recovered. Aplt. Brf. at 15-29, 34-50. Defendant claims that the reopening and continuance violated state due process under *State v. Brickey*, 714 P.2d 644 (Utah 1986), and its progeny. Aplt. Brf. at 16-. He also contends that the reopening and continuance were barred under rule 7 of the Utah Rules of Criminal Procedure and rule 1102 of the Utah Rules of Evidence. Aplt. Brf. at 41-43, 49-50. These arguments fail.

A. THE BRICKEY RULE APPLIES ONLY TO THE REFILING OF CHARGES EARLIER DISMISSED FOR INSUFFICIENT EVIDENCE AT A PRELIMINARY HEARING

1. Brickey and its Progeny Addressed the Propriety of Refiling Charges That Were Earlier Dismissed.

In support of his claim that the reopening and continuance violated his state due process rights, defendant relies on *Brickey* and a line of Utah cases applying the "*Brickey* rule." These decisions, however, address the refiling of criminal charges earlier dismissed for insufficient evidence at a preliminary hearing. In this case, the magistrate never dismissed the charges against defendant. These cases, therefore, do not apply here.

In *Brickey*, the preliminary hearing magistrate dismissed the charge against defendant after finding insufficient evidence for bindover. 714 P.2d at 645. Disagreeing with the decision, and candidly admitting that he was forum-shopping, the prosecutor refiled the charge. *Id.* at 646-47. The *Brickey* Court acknowledged that refiling is not barred under state law or the double jeopardy provisions of the federal and state constitutions. *Id.* at 646. The Court held, however, that "due process considerations prohibit a prosecutor from *refiling* criminal charges *earlier dismissed* for insufficient evidence unless the prosecutor can show that new or previously unavailable evidence has surfaced or that other good cause justifies refiling." 714 P.2d at 647 (emphasis added). In this case, the charges were never dismissed for insufficient evidence or for any other reason.

Defendant also relies on *State v. Redd*, 2001 UT 113, 37 P.3d 1160, *State v. Morgan*, 2001 UT 87, 34 P.3d 767, and *State v. Fisk*, 966 P.2d 860 (Utah App. 1998). *See* Aplt. Brf. at 16, 19-21, 29, 48-49. Those cases likewise involved the refiling of charges after a

dismissal following a preliminary hearing. *See Redd*, 2001 UT 113, at ¶¶ 1-3; *Morgan*, 2001 UT 87, at ¶ 4; *Fisk*, 966 P.2d at 861. They too, therefore, are inapposite.

Support for defendant's claim in other jurisdictions is likewise absent. The cases cited by defendant from other jurisdictions are inapplicable for the same reason the Utah cases are inapplicable—they address only the refiling of charges *after* those same charges have been dismissed following a preliminary hearing. *See Jones v. State*, 481 P.2d 169, 171 (Okla. Crim. App. 1971) (after charges dismissed following a preliminary examination, prosecutor refiled same charges); *Holmes v. District Court of Summit County*, 668 P.2d 11 (Colo. 1983) (after charges dismissed following a preliminary hearing, prosecutor filed information charging defendants with identical charges); *People v. Walls*, 324 N.W.2d 136 (Mich. App. 1982) (after second-degree sexual conduct charge dismissed following a preliminary examination, prosecutor charged defendant with first-degree criminal sexual conduct); *Stockwell v. State*, 573 P.2d 116 (Idaho 1977) (after magistrate refused to bind defendant over for second degree murder, prosecutor dismissed voluntary manslaughter charge and refiled for second degree murder).

In sum, defendant has cited no decision, and the State is aware of none, holding or even suggesting that due process is violated by reopening the State's case after the prosecution has rested or by continuing a preliminary hearing to permit the introduction of additional evidence.

2. The Brickey Rule Should Not Be Extended to Reopenings or Continuances.

Defendant nevertheless claims that the *Brickey* rule should apply to requests to reopen the prosecution's case or to continue the preliminary hearing. Aplt. Brf. at 15-16 fn.2, 18-20, 41-49. He argues that reopening the State's case and continuing the hearing are "akin to dismissing and refiling" and implicate "the very same fundamental fairness and due process concerns" of refiling. Aplt. Brf. at 16 fn.2, 18-20, 41. These arguments are unpersuasive.

"The lodestar of *Brickey* . . . is fundamental fairness." *Morgan*, 2001 UT 87, ¶ 15. *Brickey* and its progeny have thus held that state due process precludes a prosecutor from seeking an unfair advantage over a defendant through abusive refiling practices. *Redd*, 2001 UT 113, at ¶ 13. Abusive practices that violate due process include: (1) forum shopping, *Brickey*, 714 P.2d at 647; (2) "repeated filings of groundless and improvident charges for the purpose to harass," *Redd*, 2001 UT 113, at ¶ 20; and (3) "intentionally holding back crucial evidence to impair a defendant's pretrial discovery rights and to ambush [him or] her at trial with the withheld evidence," *Morgan*, 2001 UT 87, at ¶ 14.

None of these practices are implicated by reopening the State's case after the prosecution has rested or by continuing the hearing. First, there is no danger of forum shopping because the same magistrate presides over the reopened case and the continued hearing. Second, there is no danger of harassment by multiple criminal filings because there are none—defendant is charged with the offense only once. *See Morgan*, 2001 UT 87, at ¶ 25 (finding no harassment where prosecutor "attempted to reopen the preliminary hearing immediately upon recognizing the magistrate was not satisfied with the level of evidence

required to bind over defendant"). Harassment through repeated continuances is also of no concern because the continuance of a proceeding is discretionary with the court. *See State v. Oliver*, 820 P.2d 474, 476 (Utah App. 1991) (holding that "[t]he grant or denial of a continuance is within the discretion of the trial court"), *cert. denied*, 843 P.2d 516 (Utah 1992); *see also State v. Smith*, 2003 UT App 52, ¶ 35, 65 P.3d 648 (holding that "[a] trial court has discretionary authority to determine whether to reopen a case to admit additional evidence"), *cert. granted on other grounds*, 76 P.3d 691 (Utah 2003). And likewise, there is no danger of a prosecutor intentionally withholding crucial evidence because he or she runs the risk that the magistrate will deny any motion to reopen or continue. In short, none of the concerns identified in *Brickey* and its progeny are present with reopening or continuing.

Defendant claims that the *Brickey* rule should be extended to continuances because the function of the *Brickey* rule is to "ensure[ ] that groundless or improvident prosecutions do not proceed, protect[ ] the defendant from the degradation and expense of having to defend at more than one preliminary hearing, [and] conserve[ ] judicial resources by not allowing the state to repeatedly waste court time by refiling cases and conducting multiple hearings . . . ." Aplt. Brf. at 18. That is not what the Court in *Brickey* held. Rather, the Court explained:

> The *preliminary hearing* [ ] acts as a screening device to 'ferret out . . . *groundless and improvident prosecutions*.' This function [of the preliminary hearing] is important because it not only *relieves the accused of the 'substantial degradation and expense' attendant to a criminal trial*, but also because it helps *conserve judicial resources* and promotes confidence in the judicial system.

Brickey, 714 P.2d at 646 (quoting *State v. Anderson,* 612 P.2d 778, 783-84 (1980)). In other words, ferreting out "groundless and improvident prosecutions" is the function of the *preliminary hearing*, not the *Brickey* rule. Relieving the accused of the "substantial degradation and expense of a criminal trial" is the purpose of the *preliminary hearing*, not the *Brickey* rule. Conserving judicial resources is likewise the purpose of the *preliminary hearing*, not the *Brickey* rule.

Defendant has taken language referring to the purposes of the preliminary hearing and rephrased it to refer to the purposes of the *Brickey* rule. The Supreme Court never suggested that these purposes are equivalent with the purposes of the *Brickey* rule. To the contrary, *Brickey* is only concerned with the refiling of criminal charges to the extent that refiling is done with an intent to harass, forum shop, impair a defendant's discovery rights, or ambush a defendant at trial. Otherwise, "*Brickey* does not . . . indicate any intent to forbid refiling generally or preclude refiling where a defendant's due process rights are not implicated." *Morgan*, 2001 UT 87, at ¶ 15.

As held by the Oklahoma Court of Appeals—the source of Utah's *Brickey* rule—the due process limits on refiling charges earlier dismissed does *not* "provide for any lessening of the examining magistrate's discretion in the *conduct* of a preliminary examination." *Harper v. District Court of Oklahoma County*, 484 P.2d 891, 897 (Okla. Crim. App. 1971)

(emphasis added). As such, "granting the state a continuance at a preliminary examination is within the discretion of the examining magistrate." *Id.*[2]

3. Even if Brickey Applied to Reopenings and Continuances, the Reopening and Continuance Here Did Not Violate Brickey.

Even assuming arguendo the *Brickey* rule did extend to reopenings and continuances, the reopening of the prosecution's case and continuance of the preliminary hearing here comported with state due process principles.

As noted, *Brickey* holds that a prosecutor may not refile criminal charges earlier dismissed for insufficient evidence "unless the prosecutor can show that new or previously unavailable evidence has surfaced or that other good cause justifies refiling." 714 P.2d at 647. In *Morgan*, the Utah Supreme Court clarified that new and previously unavailable evidence are but two examples of good cause. 2001 UT 87, at ¶ 19. The Court explained that "'[o]ther good cause' . . . simply means additional subcategories, other than 'new evidence' or 'previously unavailable evidence,' that justify refiling. *Id.* The Court then held that good cause includes an innocent miscalculation of the evidence required for bindover. *Id.* The Court explained that "the miscalculation must be *innocent*, and [that] further

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[2] *Harper* concluded that "in the event the prosecutor miscalculates and fails to present sufficient evidence to show probable cause to bind over the accused, but possesses other witnesses whose testimony would strengthen his showing, it is clearly within the discretion of the examining magistrate to grant the state a continuance for that purpose." *Harper*, 484 P.2d at 897. The court further stated that in such circumstances "it is presumed that the additional witnesses, or other evidence, are reasonably available; and that a continuance will not be sought in order to conduct further investigation seeking that evidence, in a dilatory manner." *Id.*

investigation must be nondilatory and not otherwise infringe on due process rights of defendant." *Id.* (emphasis in original).

Defendant charges that the prosecutor was dilatory in her preparation, contending that she was not prepared to elicit testimony "establish[ing] what specific property was missing or recovered and its value." Aplt. Brf. at 22. Specifically, defendant alleges that the prosecutor failed to make available to the witnesses a list that would have provided the necessary evidence. Aplt. Brf. at 22. She argues that the victim could only "speculate" as to what was stolen, what was recovered, and the value. Aplt. Brf. at 22-24, 28, 34-40. According to defendant, the prosecutor's decision to go forward without more specific evidence cannot constitute an innocent miscalculation. Aplt. Brf. at 19-22.

Contrary to defendant's claim, the victim was *not* "engaged in a type of guessing game as to what exactly was missing and its probable worth." Aplt. Brf. at 35. Before the prosecutor initially rested, Hildebrand clearly and unequivocally testified that the thieves stole twelve autographed baseballs, a box containing some 300 baseball cards from underneath his bed, and ten binders of baseball cards from his book shelf in the front room. R. 222: 7-10. He estimated that his autographed baseballs were worth between $1,510 and $1,850.[3] He testified that among the 300 cards in the large box, he had 35 autographed

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[3] His most valuable baseball—autographed by living members of the 500 Home Run Club—was worth "well over [$]500." R. 222: 8. Of the remaining eleven baseballs, three were worth $50 each, those signed by Johnny Bench, Pete Rose, and Yogi Berra were worth between $120 and $150 each, and the remaining five were worth between $100 and $150 each. R. 222: 8, 21-22.

cards, ranging in value from $400 for each of his two Willie Mays cards, to $150 to $200 for other players, to $100 or less for lesser players. R. 222: 10.[4] He testified that the stolen binders included six sets of "specialty" cards, worth up to $3,000, and "hundreds and hundreds" of individual cards in each binder, worth "another $2,000." R. 222: 9. Through defendant's testimony, therefore, the State established that some $10,000 in baseball memorabilia was stolen.

Defendant criticizes the evidence of value because Hildebrand testified only in terms of estimates or "probabl[e] worth." Aplt. Brf. at 34-40. However, the State was not required to prove the value of the stolen goods with mathematical certainty. At a preliminary hearing, the prosecution need only "present sufficient evidence to support a *reasonable belief* that an offense has been committed and that the defendant committed it." *State v. Clark*, 2001 UT 9, ¶ 16, 20 P.3d 300 (emphasis added). Moreover, "'the magistrate must view all evidence in the light most favorable to the prosecution.'" *Id.* at ¶ 10 (quoting *State v. Hester*, 2000 UT App 159, ¶ 7, 3 P.3d 725). An estimate of value by the owner of stolen property meets the probable cause burden. *See State v. Purcell*, 711 P.2d 243, 245 (Utah 1985) (holding that "[b]ecause an owner is presumed to be familiar with the value of his possessions, an owner is competent to testify on the present value of his property").

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[4] The magistrate found that the total value of the 35 autographed balls was between $5,330 and $6,400. R. 176: ¶ 6. This finding fits within the price range given by Hildebrand and has not been challenged by defendant on appeal.

Hildebrand also testified that after defendant and Boone were apprehended, he recovered all the autographed baseballs. R. 222: 14, 20-22, 36. He further testified that he recovered "a lot of the cards that had been in the box" and "many of the binders" of baseball cards, though some pages were missing. R. 222: 14-15, 24, 36. Although most of the more valuable cards in the box were not recovered, he testified that he did recover the two Willie Mays cards (valued at $400 each). R. 222: 24. Allen also testified that some of the cards presented to him at the card shop were "expensive individual cards that were graded." R. 222: 30. Hildebrand did not more specifically identify the cards that were recovered or give a separate estimate of their value. However, he had already estimated the total value of stolen cards to be as much as $8,300, apart from the Willie Mays cards. Where he had recovered a "lot of the cards" in the box and "many" of the binders, including the expensive cards presented to Allen, the magistrate could reasonably infer that another $2,700 in cards had been recovered, equating to less than one-third of the value of all the stolen cards. The evidence was thus sufficient for bindover on a second degree felony before the continuance, as the magistrate ultimately ruled. *See* R. 180: ¶ 21.

Even if it was not, nothing in the record suggests that the prosecutor's failure to produce sufficient evidence regarding value was anything more than an innocent miscalculation. Where Hildebrand identified the property taken from his apartment and its estimated value, the prosecutor reasonably assumed that he also would be able to provide estimates of the value of the recovered property—with or without exhibits or lists. Moreover, the record reveals that the prosecutor "had a problem with subpoenas," and as a

result, Detective Johnson did not have time to get the evidence. R. 222: 52, 54. Given these circumstances, any lack of evidence to establish a second degree felony can only be regarded as an innocent miscalculation. Certainly, the prosecutor cannot be said to have been "seeking an unfair advantage over [ ] defendant [by] . . . withholding evidence." Redd, 2001 UT 113, at ¶ 13.

Citing *Holmes v. District Court of Summit County*, 668 P.2d 11 (Colo. 1983), defendant accuses the prosecutor here of "'the undesirable practice of presenting as little evidence as possible at the preliminary hearing.'" Aplt. Brf. at 45 (quoting *Holmes*, 668 P.2d at 15). In *Holmes*, however, the prosecutor made a tactical decision not to call the informant who participated in a controlled buy, relying instead on the hearsay testimony of the investigating officer. *Holmes*, 668 P.2d at 13. In contrast, the prosecutor here called the victim of the theft, who was in the best position to testify regarding the recovered cards. There was no attempt to conceal that testimony. *Holmes* therefore does not apply.

Nor is this case like *Redd*, where the prosecutor "failed to provide a scintilla of evidence" on an essential element of the offense. *Redd*, 2001 UT 113, at ¶ 17. In *Redd*, the Utah Supreme Court concluded that "[a] presumptively abusive practice [also] occurs when a prosecutor refiles a charge after providing *no evidence* for an essential and clear element of a crime at a preliminary hearing." *Id.* at ¶ 20 (emphasis added). As discussed above, the evidence established that in addition to the twelve baseballs, valued at up to $1,850, and the two Willie Mays cards, valued at $800, Hildebrand recovered a "lot of the cards" in the box and "many" of the binders. R. 222: 14-15, 24, 36. Although the exact value of these cards

was not established, the magistrate could reasonably infer that they represented a significant portion of the remainder of the baseball card collection, valued at some $8,300. *See*, *supra*, at 18.

In sum, the prosecutor's failure to produce more specific evidence of value was at worst an innocent miscalculation of the evidence. Therefore, even if *Brickey* applied here, the magistrate did not violate due process in allowing the State to reopen its case after resting and in continuing the preliminary hearing for additional evidence.

B. NEITHER THE RULES OF CRIMINAL PROCEDURE NOR THE RULES OF EVIDENCE BAR A CONTINUANCE OF A PRELIMINARY HEARING OR THE REOPENING OF THE STATE'S CASE AFTER THE PROSECUTION HAS RESTED.

Defendant also cites rule 1102 of the Utah Rules of Evidence as support for his claim that a preliminary hearing may not be continued. Aplt. Brf. at 42-43, 50. Defendant's reliance on that rule is misplaced.

Paragraph (a) of rule 1102 provides that "[r]eliable hearsay is admissible at criminal preliminary examinations." Utah R. Evid. 1102(a). Paragraph (b) lists nine types of hearsay evidence that is deemed reliable "[f]or purposes of criminal preliminary examinations only." Utah R. Evid. 1102(b). Paragraph (c) of the rule provides:

> **(c) Continuance for Production of Additional Evidence.** If hearsay evidence is proffered or admitted in the preliminary examination, a continuance of the hearing may be granted for the purpose of furnishing additional evidence if:
>
> (1) The magistrate finds that the hearsay evidence proffered or admitted is not sufficient and additional evidence is necessary for a bindover; or
>
> (2) The defense establishes that it would be so substantially and unfairly disadvantaged by the use of the hearsay evidence as to outweigh the interests of the declarant and the efficient administration of justice.

Utah R. Evid. 1102(c). In other words, "[p]aragraph (c) provides for continuances in the preliminary examination to enable a party to provide live witnesses or a more reliable form of hearsay where a party is substantially disadvantaged by the admission or exclusion of hearsay evidence proffered under this rule." Utah R. Evid. 1102, Advisory Committee Note.

As the foregoing examination of the rule demonstrates, rule 1102 does no more than govern the admission of hearsay at a preliminary hearing. It does not purport to limit the magistrate's discretion in granting continuances generally, as argued by defendant.

Defendant also contends that rule 7(i) of the Utah Rules of Criminal Procedure prohibits the State from reopening its case after it has rested or from obtaining a continuance after having introduced some evidence. Aplt. Brf. at 41, 48-50. Rule 7(i) contains no such prohibition.

Rule 7(i) provides in relevant part as follows:

> (2) If from the evidence a magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate shall order, in writing, that the defendant be bound over to answer in the district court. . . .
>
> (3) If the magistrate does not find probable cause to believe that the crime charged has been committed or that the defendant committed it, the magistrate shall dismiss the information and discharge the defendant. The magistrate may enter findings of fact, conclusions of law, and an order of dismissal. The dismissal and discharge do not preclude the state from instituting a subsequent prosecution for the same offense.

Utah R. Crim. P. 7(i). The rule presupposes the termination of the hearing and the inclusion of all the State's evidence. It in no way suggests that the magistrate may not permit the State to reopen its case after resting but before a final order of dismissal.

Moreover, rule 7 provides that "a preliminary examination shall be held under rules and laws applicable to criminal cases tried before a court." Utah R. Crim. P. 7(i)(1). The Utah Supreme Court has held that a court "has broad latitude to control and manage the proceedings and preserve the integrity of the trial process." *State v. Parsons*, 781 P.2d 1275, 1282 (Utah 1989).

Consistent with a court's broad latitude in managing the proceedings, Utah appellate courts have long recognized that a trial court may grant a prosecutor's request to reopen its case at trial to meet an insufficiency challenge. *State v. Smith*, 2003 UT App 52, ¶ 35, 65 P.3d 648, *cert. granted on other grounds*, 76 P.3d 691 (Utah 2003). For example, in *State v. Gregorious*, 81 Utah 33, 16 P.2d 893 (1932), the defendant was charged with having committed an infamous crime against nature. The State rested its case after calling as its only witness an accomplice to the crime. *Id.* at 894-95. Citing the rule that a conviction could not be sustained based on the uncorroborated testimony of an accomplice, the defendant moved for a directed verdict for insufficient evidence. *Id.* at 895. Rather than granting defendant's motion, the trial court granted the State's request to reopen the case so that it could call a witness who could provide the corroborating testimony. *Id.* The Utah Supreme Court affirmed the conviction, holding that "[i]t was within the discretion of the court to permit the case to be reopened." *Id.*

In *State v. Lawrence*, 120 Utah 323, 234 P.2d 600 (1951), the State charged defendant with grand larceny, but failed to put on any evidence of the value of the stolen car. *Id.* at 325-26, 234 P.2d at 601. Rather than moving to reopen the case, the State asked the trial

court to take judicial notice that the car's value exceeded the grand larceny requirements. *Id.* at 326, 234 P.2d at 601. The court denied the motion for a directed verdict and instructed the jury that it must "'take the value of this property as being in excess of $50.00 and therefore the defendant, if he is guilty at all, is guilty of grand larceny.'" *Id.* In holding that the judge erred in so instructing the jury, the Supreme Court noted that the prosecutor "might properly and with little difficulty have moved to reopen and supply the missing evidence." *Id.*

Just as a trial court has the discretion to permit the State to reopen its case in response to an insufficiency challenge after the prosecution has rested, a magistrate has the authority to permit the State to reopen its case or to continue a preliminary hearing.

Relying on *State v. Johnson*, 782 P.2d 533 (Utah App. 1989) (*opinion withdrawn from publication May 8, 1990*), defendant contends that a motion to reopen a preliminary hearing is not recognized in Utah. Aplt. Brf. at 15 fn.2, 42.[5] Defendant fails to mention, however, that the State's motion to reopen the preliminary hearing in *Johnson* came *after* the magistrate *dismissed* the charges following a preliminary hearing, and was treated as a motion for a new trial, which indeed it was. *Johnson*, 782 P.2d 533, *1-2. Therefore, the motion to reopen in *Johnson* was not a motion similar in kind to that made by the prosecutor in this case, which came *during* the preliminary hearing. The State's motion to reopen in

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[5] The decision in *Johnson* was withdrawn from publication after a rehearing was granted. *See Johnson*, 782 P.2d 533. Although the decision no longer appears in the bound volume of the Pacific Reporter, the State uses the Pacific Reporter citation because it can be located in Westlaw with that citation. Pin cites, however, are not available, and the State thus uses the screen number, e.g., *Johnson*, 782 P.2d 533, at *3.

Johnson "serve[d] no purpose other than to request the trial court to reconsider its *order of dismissal*." *Id.* As mentioned, no order of dismissal was issued in this case. *Johnson*, therefore, does not support defendant's claim.

* * *

In summary, the preliminary hearing is not a game, where every misstep by the prosecutor inures to the benefit of the defendant. The *Brickey* rule itself focuses on balancing both a prosecutor's right to freely prosecute and a defendant's due process rights. *Morgan*, 2001 UT 87, at ¶ 11. And as aptly observed by the Supreme Court of North Dakota long ago, "[r]ules of criminal procedure were not formulated to enable criminals to escape punishment," but rather, "to aid the courts in properly dispensing justice in criminal cases." *State v. Webb*, 162 N.W. 358, 362 (N.D. 1917). Continuing, the North Dakota court observed that such rules "are intended, on the one hand, to safeguard the rights of the accused to the end that no innocent person may be convicted of crime, and they are intended, on the other hand, to enable the state to bring those guilty of crime to the bar of justice." *Id.* Where a prosecutor fails to put on sufficient evidence to bind over a defendant, neither due process nor the rules of procedure bar the court from reopening the case or continuing the hearing to provide the necessary evidence.

II. THE EVIDENCE AT THE PRELIMINARY HEARING WAS SUFFICIENT TO ESTABLISH PROBABLE CAUSE THAT DEFENDANT POSSESSED THE BASEBALL MEMORABILIA FOUND IN HIS FRIEND'S CAR AND APARTMENT

Defendant further argues that the evidence was insufficient to demonstrate his constructive possession of the baseball memorabilia inside his friend's car and apartment. Aplt. Brf. at 30-34. This claim fails.

To demonstrate constructive possession, the State must establish "that there was a sufficient nexus between the accused and the [property] to permit an inference that the accused had both the power and the intent to exercise dominion and control over the [property]." *State v. Fox*, 709 P.2d 316, 319 (Utah 1985). The Utah Supreme Court has explained that the determination of constructive possession "turns on the particular circumstances of the case." *Id.* Factors that may be considered in linking an accused with property include incriminating statements, suspicious or incriminating behavior, sale of [the property], use of [the property], proximity of defendant to location of [the property], [property] in plain view, and [property] on defendant's person." *State v. Salas*, 820 P.2d 1386, 1388 (Utah App. 1991). These factors, however, "are not universally pertinent factors, and they are not legal elements of constructive possession in any context." *State v. Layman*, 985 P.2d 911, 914 (Utah 1999).

For purposes of bindover, the evidence was sufficient to establish a reasonable belief that defendant had both the power and intent to exercise dominion and control over the stolen baseball memorabilia.

Defendant made incriminating statements, admitting that he possessed Hildebrand's stolen baseball cards. When interviewed about the stolen cards, he claimed that he had "found some baseball cards and other items" near a dumpster while at work. R. 222: 35, 37-39. He explained that he decided to sell the cards because he believed they were worth some money. R. 222: 35, 37-39. *Boone also made statements incriminating defendant.* Boone told Detective Johnson that *defendant* had asked him for a ride so *defendant* could sell some cards. R. 222: 43. *Defendant sold some of Hildebrand's stolen baseball cards.* The evidence established that two men walked into Allen's baseball card shop wanting to sell Hildebrand's stolen baseball cards. R. 222: 28-29. Defendant was subsequently found with a check from a card shop payable to *defendant* at the check cashing store to which Allen referred the two men. *See* R. 222: 13, 33-35, 37, 39, 42. *A stolen baseball and card were found in the area where defendant presumably sat while traveling to sell the baseball cards.* Defendant admitted that he rode in Boone's car and the most expensive baseball and a baseball card were found on the front passenger floorboard of Boone's car. R. 222: 36.

Although the foregoing evidence *might* not be sufficient to prove constructive possession at trial, it is more than sufficient under the "relatively low" evidentiary standard required at a preliminary hearing. *Clark*, 2001 UT 9, at ¶ 10. Under this standard, the facts need only support a reasonable inference of possession. *Id.* at ¶¶ 11, 20. This is so even if the facts also support a contrary inference. *Id.* at ¶ 20. Indeed, this Court "'assum[es] [ ] that the prosecution's case will only get stronger as the investigation continues.'" *Id.* (quoting *Evans v. State*, 963 P.2d 177, 182 (Utah 1998)).

Based on Boone's admission that he was responding to defendant's request for a ride to sell the baseball cards and defendant's admission that he possessed baseball cards which were stolen from Hildebrand, the magistrate could reasonably infer that defendant first took the cards to Boone's apartment and from there went to the card shop. The magistrate could also reasonably infer that Boone minimized his own role in the theft and that both men possessed the cards. Either way, the reasonable inference is that defendant had both the power and intent to exercise dominion and control over the cards in both the trunk and the apartment. The only other inference is that defendant found some of the stolen cards at work and that Boone obtained possession of the other cards independently. That inference is the least likely of all the inferences.

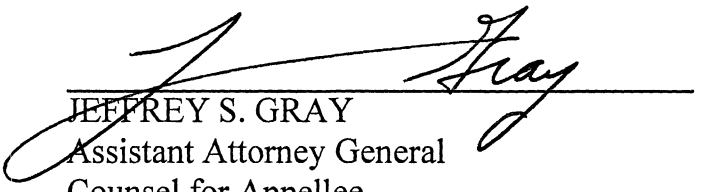
In sum, the evidence was sufficient to support a reasonable inference that defendant possessed all of the stolen cards that were recovered by police. This Court should therefore affirm the magistrate's bindover order.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant's convictions.

Respectfully submitted July 14, 2004.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2004, I served two copies of the foregoing Brief of Appellee upon the defendant/appellant, Daniel Bagley Rogers, by causing them to be delivered by first class mail to his counsel of record as follows:

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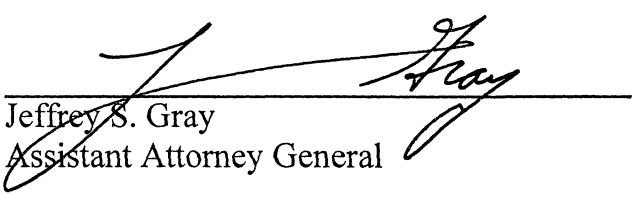

Jeffrey S. Gray
Assistant Attorney General

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Addendum A

IN THE THIRD JUDICIAL COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,
WEST VALLEY DEPARTMENT

STATE OF UTAH, Plaintiff, vs. DANIEL ROGERS, Defendant.	: : : :	**MEMORANDUM DECISION** (Motion to Quash Bindover) Case No. 021101432 FS Judge PAT B. BRIAN

¶1 The above-entitled matter came before the Court on April 29, 2003 for hearing on Daniel Rogers (Defendant) Motion to Quash Bindover. The Court has reviewed Defendant's motion and supplemental memorandum and the State's opposition to Defendant's motion. Having considered those memoranda along with oral arguments, the applicable constitutional provisions, statutes and case law, the Court DENIES Defendant's motion to quash.

BACKGROUND

¶2 On August 20, 2002, the Defendant was charged by information for theft by receiving stolen property, a second degree felony, in violation of Utah Code Ann. § 76-6-408 and theft by deception, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-405.

¶3 A preliminary hearing was scheduled for November 7, 2002. On November 4, 2002, the State requested a continuance. That same day, the Court granted the State's motion to continue and the preliminary hearing was rescheduled for November 26, 2002.

¶4 On November 26, 2002, Defendant failed to appear. The Court issued a bench warrant for Defendant and rescheduled the preliminary hearing for December 17, 2002.

¶5 On December 17, 2002, the preliminary hearing was held before the court, *Roth, J.*

¶6 The following facts, viewed in a light most favorable to the State, were established at the December 17, 2002, preliminary hearing. On July 23, 2002, sometime between one p.m. to eight p.m., Robert Paul Hildebrand's, (Hildebrand) apartment was broken into and many items stolen. Specifically, an unopened six disc, DVD player worth $750, a minolta 35 mm camera worth $200, a pioneer stereo with a six disc player, originally worth $900 present value $400-500, twelve (12) autographed baseballs total value between $1450-1850, ten (10) binders of baseball cards total value about $5000, autographed cards total value between $5330-6400, a set of black pearl earrings originally cost $1250 with a present value of $1500, and olympic pins worth $200. Hildebrand contacted the police department.

¶7 The following day, on July 24, 2002, Hildebrand contacted several, local baseball card shops to tell them to watch for the stolen items. Hildebrand contacted baseball card shop owner, Elvin Allen (Allen), about the stolen baseballs and cards. Within an hour, two men entered Allen's store with items that Allen believed were Hildebrand's stolen items. Allen purchased some of the items from the men using a check. Allen immediately contacted Hildebrand and informed Hildebrand that he had Hildenbrand's stolen items.

¶8 Allen cancelled the check. Later that day, Allen received a call from a check cashing place, as shown on his caller ID. Allen contacted Hildebrand and told him that the people were attempting to cash the check at a check cashing place and gave Hildebrand the phone number displayed on his caller ID.

¶9 Hildebrand contacted the police and gave them the phone number to trace the address of the check cashing location. The police arrived and observed a signed, encased baseball in the front seat and a baseball card on the floor of the front, passenger seat of the vehicle that the

Defendant and his companion, Joshua Boone (Boone) arrived in. The vehicle that Defendant and Boone arrived in was owned by Boone's girlfriend. The police detained Defendant and Boone. In the trunk of the vehicle, were many baseball cards. Defendant informed the police that he found the baseball cards in a dumpster. Thereafter, police discovered at Boone's apartment, multiple baseballs, binders, baseball cards, DVD/CD player, and Olympic pins.

¶10 At the December 17, 2002 hearing, after the State rested, Defendant argued that there was insufficient evidence to bindover. Specifically, Defendant argued that the value of the items was not sufficiently established to bindover for the second degree felony charge because the only evidence associated with Defendant was one baseball and one card. Even viewing the evidence in a light most favorable to the State, this did not amount to $5000, which is an element of the charge for theft by receiving stolen property. Defendant argued, therefore, that the bindover should be denied on that count.

¶11 The State moved to reopen because the Prosecutor was "given some more information" and needed to take some further testimony. Defendant objected, arguing that the State rested its case. The Court granted the motion to reopen.

¶12 The State recalled the police officer to the stand and asked him questions about the black pearl earrings. The officer indicated that the earrings were pawned. Although the officer did not have the pawn receipt with him, he recalled that it was in evidence at the sheriff's office.

¶13 The Court *sua sponte* continued the hearing on the limited issue of value of the items found that were attributable to Defendant, which the Court stated was the baseballs and baseball

cards found in the car and the home.[1] Defendant objected arguing that a continuance was in opposition to the purpose of a preliminary hearing because after the State rests its case and Defense counsel reveals all of the State's weaknesses, the court can just grant a continuance, allow the State to gather more evidence for the next hearing, so that there would be sufficient evidence to bindover the Defendant.

¶14 On January 7, 2003 a hearing was held on the limited issue of the value of the items found attributable to the Defendant in the car and at the home.

¶15 The Court, *Roth, J.*, bound over for trial the first charge for theft by receiving stolen property, a second degree felony, in violation of § 76-6-408 and dismissed the second charge for theft by deception, a class B misdemeanor, in violation of § 76-6-405

LAW

¶16 At a preliminary hearing "the prosecution must present evidence sufficient for the magistrate to find probable cause to believe that the crime charged had been committed and that the defendant has committed it. . . . The evidence must be viewed in a light most favorable to the prosecution with all inferences resolved in the prosecution's favor. . . . The defendant should be bound over for trial unless the evidence is wholly lacking and incapable of reasonable inference to prove some issue which supports the [prosecution's] claim." *State v. Schroyer*, 2002 UT 26, ¶10, 44 P.3d 730 (Citations omitted; internal quotation marks omitted.). Recently, the Utah Supreme Court clarified that the "quantum of evidence necessary to support a bindover is less

---

[1] The Court also continued the hearing on the issue of the earrings and the pawn ticket. Defendant objected and the State stipulated that the earrings and pawn ticket would not be an issue at the next hearing.

than that necessary to survive a directed verdict motion." *State v. Clark*, 2001 UT 9, ¶16, 20 P.3d 300. While the prosecution must produce "believable evidence of all the elements of the crime charged" in order to sustain its burden at the preliminary hearing stage, "unlike a motion for a directed verdict, this evidence need not be capable of supporting a finding of guilt beyond a reasonable doubt." *Id.* at ¶15.

¶17 Section 76-6-408 provides that theft by receiving stolen property occurs when:

> A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding the property from the owner, knowing the property to be stolen, intending to deprive the owner of it.

¶18 Theft of property is a second degree felony if the value of the property or services is or exceeds $5000. Utah Code Ann. § 76-6-412(1)(a)(i). If the value of the property stolen is less than $300 then the theft charge is a class B misdemeanor. § 76-6-412(1)(d).

ANALYSIS

¶19 Defendant claims that the Court improperly granted the State's motion to reopen. Specifically, Defendant argues that a motion to 'reopen' a preliminary hearing is not a motion recognized in the Utah Rule of Criminal Procedure *citing State v. Johnson*, 1989 Utah App. LEXIS 172, *3 (October 30, 1989)(*unpublished opinion*).

¶20 In opposition, the State argues that there was sufficient evidence to establish the second degree felony charge before the Court granted the State's motion to reopen. The Court agrees with the State.

¶21 The Court concludes that there was sufficient evidence presented before the motion to reopen was granted because the evidence presented established that Defendant was in possession or control of $5000 or more of stolen property. The evidence showed that Defendant was in possession or control of the property that was pawned to Allen because the check was written in Defendant's name. Defendant was also in possession or control of the property that was in the vehicle that Defendant and Boone arrived in at the check cashing place. The evidence reflected that there was a signed, encased baseball in the front seat and a baseball card on the front, floor of the passenger seat. In the trunk of the vehicle there were multiple baseball cards. Defense counsel inquired of the Court, *Roth, J.*, whether the evidence at the apartment would be considered and the Court, *Roth, J.*, affirmed that it would be. Defense counsel did not object. Applying the evidence obtained in the apartment as well as the evidence obtained in the vehicle and at the pawn shop, the Court concludes that there was sufficient evidence from Hildebrand's testimony that the value of the stolen property recovered was $5000 or more.[2]

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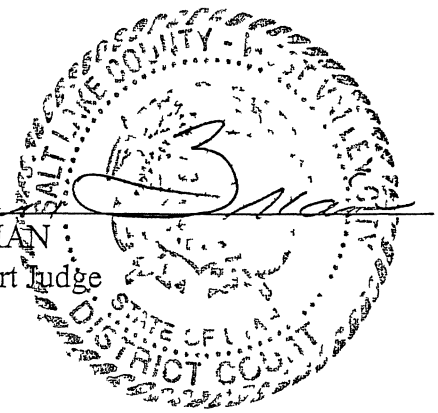
[2] Nevertheless, the Court notes that although a motion to reopen is not a motion within the Utah Rules of Criminal Procedure, the Court's, *Roth, J.*, granting of the motion to reopen was harmless error. The Court could have dismissed the charges under Utah R. Crim. P. 7(h)(3). However, the dismissal and discharge would not have precluded the State from refiling because good cause to re-file exists "when a prosecutor innocently miscalculates the quantum of evidence required to obtain a bindover." *State v. Morgan*, 2001 UT 87, ¶14, 34 P.3d 767 (Utah 2001)(*citing State v. Brickey*, 714 P.2d 644, 647 n.5 (Utah 1986). It is clear to this Court that there were no abusive practices involved in the State's motion to reopen, but simply an innocent miscalculation of the evidence necessary to bindover. Witnesses that were called at the first hearing were recalled during that hearing and at the second hearing to provide more detail about the value of the items. There does not appear to be any bad faith on the part of the prosecutor, which is what could prevent the State from refiling. Since the result would have been the same because the State could have refiled and another preliminary hearing could have been held before the Court, *Roth, J.*, this Court notes that even if the evidence was insufficient, the Court, *Roth, J.*, committed harmless error that was not prejudicial to the Defendant. If anything, the Court, *Roth, J.*, prevented an inconvenience to the Defendant by reopening the State's case. *State v. Morgan*,

¶22 Accordingly, the Court DENIES Defendant's motion to [illegible]

Signed this 16 day of June 2003



Judge PAT B. BRIAN
Third District Court Judge